No. 82-1410 and No. 82-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLIKEN RESEARCH CORPORATION and CHAVANOZ, S.A.,
Petitioners,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.,*
Respondents.

MILLIKEN & COMPANY,
Petitioner,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.,*
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because Petitioners assert the existence of questions which are, in fact, not presented by the record in this litigation, a reformulation of their statement of questions is necessary.

1. In bifurcated antitrust litigation without a jury where an initial trial and appeal have established that royalty payments were the result of an antitrust violation, the purpose of which was to cause such payments to be made, are the lower courts precluded from adopting a trial format in the damages phase of the litigation in which the stipulated payments resulting from the violation are deemed *prima facie* proof of damages, with defendants having "the opportunity to prove that the actual royalties paid do not in fact equal the overcharge which is the true measure of plaintiffs' damages"? [Milliken Research Corporation Question 1; Milliken & Company Question 3]

2. In bifurcated antitrust litigation without a jury, may the lower courts establish a format in which the second trial will be confined to amount of damages, with issues of violation and causality to be determined at the initial trial, with the result that defendants will be precluded from litigating at the damages trial a causality defense in the nature of *in pari delicto* which was not presented, and indeed was contrary to defendants' contentions, at the initial trial? [Question 2 in both petitions]

3. Is the tort concept of "claim reduction," which has never been applied by any court except as an adjunct to a rule permitting contribution among joint tort-feasors, available in an antitrust case to reduce a plaintiff's total recovery to less than the statutory "threefold the damages by him sustained" by reason of the antitrust violation, despite the unavailability of contribution in antitrust cases under this Court's recent decision in *Texas Industries, Inc.*

v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). [Milliken Research Corporation Question 3; Milliken & Company Question 1]

4. Where the damages claim of a corporate party includes damages originally inflicted on a subsidiary of that party to which the party succeeded by merger, does due process impose upon the corporate party a special duty of notification concerning its damages claim apart from, and in addition to the duties of that party under, the Federal Rules of Civil Procedure? [Milliken Research Corporation Question 4]

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption and identified in the Petitions filed by Milliken & Company and Milliken Research Corporation, Madison Throwing Company, Inc. is a party to this proceeding. Burlington Industries, Inc. has certain affiliates, other than wholly-owned subsidiaries, which are identified below:

Burlington AG
Fibras Textiles de Mexico, S.A. de C.V.
Mitsubishi Burlington Company, Limited

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Respondents Burlington Industries, Inc. ("Burlington") and Madison Throwing Company, Inc. ("Madison") (sometimes collectively referred to herein as "Respondents" or "Burlington"), submit this brief in opposition to the Petitions for Writs of Certiorari filed by Petitioners Milliken Research Corporation (formerly known as Deering Milliken Research

Corporation and referred to herein as "DMRC") and Chavanoz, S.A. ("Chavanoz") in No. 82-1410 ("DMRC Pet.") and by Milliken & Company ("Milliken") in No. 82-1421 ("Milliken Pet.").[1] Both Petitions seek review of the same decision below. By order of this Court dated March 11, 1983, this Brief will respond to both Petitions.

STATEMENT OF THE CASE

At the liability stage of this bifurcated litigation, the district court held that Petitioners had engaged in a *per se* violation of the antitrust laws by reason of a horizontal combination with Leesona Corporation ("Leesona"), their only significant competitor in the licensing of false twist textile machines. The court further ruled that by reason of that illegal conduct—which entailed an agreement to "stabilize and maintain" the parties' respective royalty programs on those machines—Respondents, who operated and paid royalties on such machines, suffered injury to their business and property within the meaning of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). *Duplan Corporation* v. *Deering Milliken, Inc.*, 444 F. Supp. 648 (D. S.C. 1977). Those holdings were sustained on appeal, 594 F.2d 979 (4th Cir. 1979), and this Court denied petitions for writs of certiorari filed by Petitioners, 444 U.S. 1015 (1980).

The district court, pursuant to its earlier bifurcation order, then conducted a trial on the sole issue of the amount of damages sustained by Respondents. In light of the findings that had been made at the liability trial, the district court issued pretrial rulings setting forth the order of proof at the damages trial and excluding certain evidence which Petitioners sought to present. Petitioners' Joint Appendix ("J.A.") 75-79. At the conclusion of the trial, the district court entered judgment for Respondents (J.A. 81) in an amount which was later

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1 DMRC, Chavanoz and Milliken are collectively referred to herein as "Petitioners."

reduced after Petitioners made a belated argument concerning their defense of "claim reduction" (J.A. 87).

The court of appeals affirmed the district court's ruling with respect to the order of proof at the damages trial (J.A. 11, 690 F.2d 380, 386 (4th Cir. 1982)), but reversed on the "claim reduction" issue, ruling that the court was in error in recognizing such a defense (J.A. 22-31, 690 F.2d at 391-95). In addition, while agreeing that some evidence was properly excluded by the district court (J.A. 12-15, 690 F.2d at 387-88), the court of appeals took a broader view than did the district court of the issues which remained open at the damages trial and, therefore, vacated the judgment and remanded for consideration of certain other excluded evidence (J.A. 11, 690 F.2d at 386).

Thus, the case is before this Court in an interlocutory posture with the parties who are seeking review having succeeded in the court of appeals in having a judgment vacated and the case remanded for a new damages trial. In their effort to persuade this Court to intervene at an intermediate stage of the case, Petitioners have distorted almost beyond recognition the rulings actually made below. They have also filed separate petitions on behalf of a parent corporation and its wholly-owned subsidiary (which were jointly represented in the courts below), obscuring the same misstated issues in different garb. Furthermore, Petitioners are simply being disingenuous when they suggest (*e.g.*, Milliken Pet. at 10) that the issues which they attempt to raise are not "fact-bound" and, therefore, will have broad application to antitrust cases in general. To a very considerable extent, the rulings of the courts below are the product of the highly unique and specialized set of facts presented by the record of this particular case and, Respondents respectfully submit, its teachings will not provide widespread guidance for future cases.

The Parties. There were two defendants below which are not petitioners here; they were sellers of good quality false twist textile machines used to texture synthetic yarn. Petitioners, on the other hand, were purveyors of coerced licenses

under a portfolio of worthless patents, every one of which was finally adjudged at the liability stage of this litigation to have been invalid and/or non-infringed, as well as unenforceable by reason of patent misuse.

Specifically, Petitioner Chavanoz was the owner of twenty-two patents purporting to cover alleged product and process improvements for ARCT false twist textile machines operated by Burlington and other yarn texturers (who are known in the trade as "throwsters"). That portfolio, now wholly discredited, was the ostensible basis for the exaction of production royalties from Burlington and other throwsters by Petitioners.

Chavanoz purportedly granted to DMRC the exclusive right to use in the United States false twist machines embodying the improvements claimed in the Chavanoz patents. It is critically important to note that DMRC did not make, sell or receive compensation from the sale of false twist machinery. DMRC's sole function was to collect so-called use royalties on the operation of the false twist machines after they were sold (which royalties were then split with Chavanoz).

The machines were manufactured by Chavanoz' manufacturing and selling licensee, defendant Ateliers Roannais de Constructions Textiles ("ARCT-France") and sold in the United States to Whitin Machine Works ("Whitin") and later to ARCT-France's American subsidiary, defendant ARCT, Inc., which, in turn, sold them to American throwsters, such as Respondents.[2] ARCT-France and ARCT, Inc. derived revenue only from the sale of false twist machines. They did not collect or share in the illegal royalties collected by DMRC.[3]

2 DMRC, Chavanoz, Milliken, ARCT-France and ARCT, Inc. are collectively referred to herein as "defendants."

3 DMRC, in concert with Chavanoz, ARCT-France and its distributors Whitin and later ARCT, Inc., required purchasers of ARCT machines to sign a standard, printed form production royalty agreement in order to obtain delivery of the false twist machines that they had purchased from Whitin or ARCT, Inc. "The royalty system," the Court of Appeals for the Fourth Circuit stated in its decision on liability issues in this case, "depended upon the restriction of machine

Prior to the commencement of this litigation in 1969, virtually the entire United States market in false twist machines was shared by the ARCT and Leesona machines. 444 F. Supp. at 686. Leesona not only manufactured false twist machines but was also the owner of its own false twist patents relating to machines and processes and, in parallel with defendants, also required purchasers of its machines, such as Burlington, to sign a license imposing production royalties. *Id.* at 675-76.

Respondents were the victims of the illegal royalty preservation agreement between defendants and Leesona. As a result of that unlawful combination, Burlington and Madison were damaged by the payment of more than $7,756,000 in royalties during the applicable damages period (J.A. 49). After nearly fourteen years of litigation, however, Respondents have yet to recover one penny of those damages from defendants.

The Antitrust Violation That Was Established at the Initial Trial on Liability. The essence of the antitrust violation found by the district court at the liability stage of this case was that Petitioners and Leesona agreed to preserve their mutually interdependent royalty programs against the threat of destruction. The principal threat was patent litigation between the competitors involving allegations by Leesona that its false twist patents were infringed by ARCT machines. The competitors agreed to abandon that litigation by settlement in 1964, not for the purpose of resolving a legitimate controversy as to patent coverage, but upon the express recognition that the trial and disposition of the case would undermine their interdependent royalty programs. They, therefore, acted jointly to insure that the patents of both would be preserved and the production royalty programs would continue. The sales prices of the machines themselves were not the subject of the illegal combination or the resulting *per se* violation of the Sherman Act.

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deliveries to DMRC use licensees. . . ." 594 F.2d at 982. As a result of their role in such restrictions, ARCT-France and ARCT, Inc. were found by the court of appeals to be liable as co-conspirators despite the fact that they did not share in the illegal royalties.

This was made clear by the district court's holding in its 1977 liability opinion that "there accompanied the settlement of March 31, 1964, the intent and an implicit agreement to stabilize and maintain production royalty rates. . . ." 444 F. Supp. at 683. In affirming *per curiam* on the basis of the district court's "thorough, explicit and sound" opinion, the court of appeals characterized the 1964 settlement as "the core of a scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines." 594 F.2d at 981-82.

The district court expressly found that the respective royalty programs of DMRC/Chavanoz and Leesona were interdependent—that one could not exist without the other—and that that interdependence was not only perceived and admitted by defendants and Leesona, but their recognition of it was the subject of repeated communications. 444 F. Supp. at 682, 685-87. It also held that DMRC, Chavanoz and Leesona entered into the 1964 settlement of their patent litigation with a "dominant purpose" which was anticompetitive, that purpose being "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed." *Id.* at 682. The district court found that:

> As the case wore on it became more and more apparent to both sides that the results of victory might well be outweighed by the possibility of facing unlicensed competition in the false twist machinery market, a thought epitomized in Leeson's [President of Leesona] statement to Armitage [DMRC representative]: "*If you win you lose, and if you lose, you lose—because if the patent is broken, there will be no royalty*" . . . This thinking finally prevailed, and the settlement of March 31, 1964 with its trade-restraining, anti-competitive results soon followed.

Id. at 687 (emphasis added).

It was established at the liability trial, therefore, that the settlement had an anticompetitive effect and was entered into with a purpose that was also anticompetitive. As the district court found, "the underlying tenet of the settlement discussions between defendants and Leesona was one which [Leesona's president] expressed succinctly in August 1963: 'Everything to settle so that all competitors [charge] a royalty.' " (Respondents' Appendix[4] 1; *see* 444 F. Supp. at 679).[5]

Another threat to the royalty programs was the emergence of unlicensed competition, which Petitioners and Leesona agreed and acted jointly to squelch, the district court found, in order to protect their own licensing programs from royalty-free machines of others. 444 F. Supp. at 681, 686.

In the course of the formation and execution of the combination, defendants and Leesona were found by the district court to have done virtually all of the things that have become the hallmarks of illegal horizontal conduct. They not only discussed their mutual interest in royalty collection and the total interdependence of their royalty programs, but they also "agree[d] in principle" that production royalties from American throwsters should be shared (*Id.* at 678-79), and even agreed to conceal their illicit undertaking by agreeing orally that " 'there is no reason for us [DMRC] to reduce royalties unless you [Leesona] force us to do so' " and, upon that understanding, deleting from their written settlement agreement a provision which, in effect, put a penalty on reducing royalties. *Id.* at 680.

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4 Respondents' Appendices are found at the back of this brief and references thereto appear as "R.A."

5 The anticompetitive purpose was also aptly summarized by a Whitin representative in a statement to one of the throwsters: "They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leesona] patents out but in this case there would have been no royalty collected by Leesona which would have made it all the harder for ARCT to collect any royalty." (R.A. 2). That same person also made the observation that if the Leesona royalty program falls "the whole system of licenses . . . is doomed to failure." (R.A. 3).

The agreement between the competitors to (in the words of one of the circuit judges at the argument of the liability appeal) "ensure that production royalties would be" was correctly treated by the courts below as a form of price fixing. However, neither the district court nor the court of appeals, in either liability or damage opinions, found that a purpose of the combination was to maximize total return from the sale of false twist machines. The lower courts did not make such findings because this case—unlike the typical price fixing case—did not involve fixing the sales price of the false twist machines. Rather, it involved the imposition of a separate, easily identifiable charge on the throwsters who used the machines. That charge was the royalty. Thus, the conspirators, by their own actions, measured the amount of the overcharge by separating it from the machine price and, with respect to defendants' machines, by requiring that it be paid to someone other than the seller of the machine. This key factor makes this case quite rare and robs it of precedential value for routine price fixing cases. Accordingly, this case, while important to the parties (and, at an earlier stage, to the entire American throwster community which was enslaved by these royalty programs), presents legal issues in a factual framework that is remote from typical antitrust litigation.

The Liability Trial and Appeal Established That Royalties Constituted Antitrust Damages. In ruling for Respondents on liability, the district court made the finding requisite to a holding of liability under section 4 of the Clayton Act (15 U.S.C. § 15) that Respondents had demonstrated injury to their business and property as a result of Petitioners' antitrust violations (a concept variously referred to in antitrust cases as "causality," "impact" or "fact of damage").[6] Thus, prior to the damages trial, the district court had found a causal connection between the violation and payment of the royalties and it had specifically determined that the payment of royalties to DMRC constituted evidence of damage:

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6 *See, e.g., Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1320, 1321 n.34, 1324 (5th Cir. 1976).

> On the question of the impact these results had on the plaintiffs it is not seriously challenged that unless the plaintiffs in this action signed the DMRC use license and paid the required royalties they could not obtain the ARCT machines which they badly needed in their businesses. The sizable royalty income collected by DMRC in the years following the settlement affords graphic proof of the impact which the program had upon those businesses. The court concludes that as a direct consequence of the violations of Sections 1 and 2 of the Sherman Act by DMRC and Chavanoz the plaintiffs have been injured in their business and property within the purview of 15 U.S.C. § 15.

444 F. Supp. at 687.

Contrary to Milliken's representation (Milliken Pet. at 15), the district court also found that fact of damage was established by reason of Respondents' royalty payments to Leesona. It was one of the effects of the combination, the court found, that "after 1964, each of the plaintiffs paid production royalties to DMRC and those plaintiffs that operated Leesona machines or machines of Leesona's manufacturer's licensees also paid production royalties to Leesona." (R.A. 4; *see also* 444 F. Supp. at 692). In short, Respondents were victimized when they paid the royalties which it was the purpose of the conspiracy to exact.[7]

These findings of causality were unanimously affirmed by the court of appeals in the face of an all-out attack by Petitioners. 594 F.2d 979. The same assault on the causality determination was mounted in subsequent petitions for writs of certiorari and those writs were denied. 444 U.S. 1015.

The Decisions Below on Damages. Based on the fact of damage and other findings at the liability trial, the district

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7 *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962).

court issued its order of August 4, 1980 ("August 4 Order") (J.A. 75-79) delineating the proper scope of the issues remaining to be tried on the amount of damages sustained by Respondents. The August 4 Order had two facets. First, it established that, at the damages trial, proof of the royalty payments made by Burlington "will suffice to establish a *prima facie* case of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for the royalties . . ." (J.A. 77). Second, the August 4 Order established that certain damage defenses—all but one of which Petitioners had previously raised on appeal from the liability opinion in an unsuccessful attack on the fact of damage holding—were no longer "properly before the court." (J.A. 77).[8] The damages case was tried pursuant to the August 4 Order and, at the trial, defendants stipulated to the amount of royalty payments made by Respondents.

On appeal, Petitioners attacked both parts of the August 4 Order. The court of appeals affirmed that part of the Order which made proof of the royalty payments *prima facie* proof of damages, but reversed the second part of the Order, vacated

8 Indeed, in their petition for a writ of certiorari from the court of appeals' decision affirming the district court's fact of damage finding at the liability trial, Petitioners argued that proof of fact of damage rested on a "chain of assumptions which were not and never could have been proven." In that petition, DMRC and Chavanoz, for example, claimed that "there is no way, we submit, for mortal man to do anything but guess as to whether any of these assumed 'facts' would have occurred, to what degree, and when, had the settlement not taken place." Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed on behalf of DMRC and Chavanoz in *Deering Milliken Research Corp.* v. *Duplan Corp.*, No. 79-658 at 23 (relevant excerpts from that petition are set forth in R.A. 5). Petitioners now seek to force Burlington to prove this "unprovable" chain of assumptions at the damages trial despite the fact that it has long been established that an antitrust plaintiff's burden in proving amount of damages is an easier one than establishing fact of damage and that the risk of uncertainty is on the wrongdoer. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 582 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

the judgment and remanded for a new trial to give defendants the opportunity to introduce certain evidence which had been precluded by the district court to attempt to overcome Respondents' *prima facie* case (J.A. 11, 690 F.2d at 386).

Despite having succeeded on appeal in having the case remanded for additional evidence and a retrial of the damages issues, Petitioners have filed petitions for writs of certiorari seeking reversal of the *prima facie* ruling contained in the August 4 Order and sustained by the court of appeals. They also seek to have this Court review (a) the court of appeals' affirmance of a ruling by the district court excluding certain other evidence relating to causality, expressed in terms of an *in pari delicto* defense, which was not presented, and indeed was contrary to Petitioners' contentions, at the liability trial during which the issue of causality was litigated; (b) the refusal of the court of appeals to recognize the unprecedented defense of "claim reduction" and thereby reduce Respondents' damages to less than the statutorily prescribed amount; and (c) an issue relating to the specificity with which damages claims must be pleaded under the Federal Rules of Civil Procedure—an issue which Petitioners have attempted to raise to a constitutional level.

REASONS FOR DENYING THE WRIT

I.

THE RULING BY THE COURT BELOW THAT PROOF OF AMOUNT OF ROYALTIES CONSTITUTED *PRIMA FACIE* PROOF OF AMOUNT OF DAMAGES IS A PROPER EXERCISE OF DISCRETION AND RAISES NO ISSUE WORTHY OF REVIEW BY WRIT OF CERTIORARI.

The August 4 Order (J.A. 75-79) was not only correct but was required by the findings and conclusions reached in the prior liability trial. It was nothing more than a routine exercise by an experienced trial judge in a bench trial of his unquestioned power to define the issues for trial on the basis of the particular facts of the case and the findings previously made by him and affirmed by the court of appeals after an eight month trial on liability.

Although the court of appeals disagreed with the district court with respect to the scope of the evidence which should have been considered at the damages trial and, therefore, remanded for retrial, it expressly noted that the case "presents no dispute about the governing principle for the measurement of damages in a price-fixing case" (J.A. 7, 690 F.2d at 385) and sustained the *prima facie* ruling made, as a matter of discretion, by the district court against a record replete with complex and unique facts and findings. This Court does not ordinarily sit to review such "fact-bound," discretionary decisions, especially when the legal standard is not in dispute and there is no final judgment. *E.g.*, *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This case affords no basis for departing from that normal practice.

A. The Decision Below Was Based on a Routine Application of Established Principles for Defining the Issues and Order of Proof in Damages Trials.

As outlined above, the essence of the illegal combination found by the district court was to preserve the interdependent royalty collection schemes against the threat of total destruction ("there will be no royalty." *See* p. 6, *supra*). On the basis of those findings and other evidence, the district court at the liability trial also found that royalty payments were a "direct consequence" of the antitrust violations, and the court of appeals affirmed.

Despite these strong findings of causality, the court of appeals did not rule, as Petitioners claim, "that damages from a price-fixing conspiracy equal treble the full amount of the fixed element of the total price . . ." (DMRC Pet. at 12). While such a ruling might have been justified given the prior findings, it was not made and, therefore, the issue which Petitioners purport to raise (Milliken Pet., Question 3; DMRC Pet., Question 1) is not presented by this record. To the contrary, the August 4 Order specifically left open the question whether any portion of the royalties was attributable to anything other than the violation—*i.e.*, "the value of any considerations received by the plaintiffs in return for the royalties" (J.A. 77)—and at trial the district court heard extensive evidence presented by Petitioners as to such considerations (*see* J.A. 61-65).[9] The court of appeals went even further, ruling that upon remand the damages trial issues should include additional evidence excluded by the August 4 Order from which Petitioners might attempt to demonstrate that the

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9 The district court in fact found that ten percent of the royalties paid to DMRC and five percent of the royalties paid to Leesona were attributable to "other considerations" in the form of so-called "technical support services" (J.A. 64), a finding that was affirmed by the court of appeals (J.A. 20-22, 690 F.2d at 390-91). Since that finding must be taken into consideration on remand, Respondents' damages, in any event, will not be based on the full amount of the royalties paid.

amount of damages was less than total royalties (J.A. 11, 690 F.2d at 386).

It is, therefore, fatuous to suggest (*see* DMRC Pet. at 12-13) that the ruling below espouses a rule of "automatic damages." Moreover, throughout the damages trial it was recognized that the ultimate burden remained upon Respondents to prove the amount of damages which resulted from the violation. To the extent that the *prima facie* part of the August 4 Order established the order of proof at the damages trial, it was clearly within the court's discretion and plainly could not have constituted prejudicial error. 6 J. Wigmore, *Wigmore on Evidence* § 1867 (Chadbourn rev. 1976); *Philadelphia & Trenton Railroad* v. *Stimpson*, 39 U.S. 448 (1840).

The clear propriety of the court of appeals' affirmance of the *prima facie* portion of the August 4 Order is demonstrated by the very decisions of this Court cited in the Milliken and DMRC Petitions. For example, in *Westinghouse Electric and Manufacturing Co.* v. *Wagner Electric and Manufacturing Co.*, 225 U.S. 604 (1912) (DMRC Pet. at 7; Milliken Pet. at 18), this Court held, in the context of a patent suit, that an order of proof nearly identical to that set forth in the August 4 Order was perfectly permissible. In *Westinghouse*, a patentee sued an infringer to recover profits made by the infringer from the use of patented components that were incorporated in certain electrical transformers. In the subsequent accounting proceeding the master ruled, like the district court here, that it was sufficient for Westinghouse to introduce evidence of the infringer's total profits from the transformer sales. "The defendant then had the right either to disprove the plaintiff's case or to offer evidence in mitigation, or both." 225 U.S. at 616.

In the Supreme Court, the infringers attacked the master's order of proof ruling with the claim (similar to that made here) that Westinghouse had the burden of separating that portion of their profit attributable to the components covered by the infringed patent from the balance of the profit realized on the

sale of the transformers. This Court disagreed and ruled that where it was impossible to apportion the profits the "burden of separation is cast on the defendant," and that in such a case an order of proof similar to that provided for by the master (and the courts below in this case) was appropriate. *Id.* at 622; *see Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 261 (1916).

The rule in *Westinghouse* has been adopted by this Court for antitrust treble damage actions (*Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946)) and has been followed in other treble damage actions like this one in which the actions of the defendants themselves define the amount of the overcharge. For example, in *Yoder Brothers* v. *California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)—a case similar to this one in that the antitrust violation involved the unlawful collection of royalties—the antitrust claimants (defendants in that case) offered the total amount of royalties paid as one measure of damages. The court of appeals held that the royalty payments were proper evidence of damages, and indeed specifically stated, as did the courts below here, that the royalties constituted *prima facie* proof of damages. *Id.* at 1375. *Yoder* was reversed and remanded on other grounds. Significantly, however, in ordering the remand the court of appeals explicitly directed that "[o]n remand, the fact-finder must be permitted to consider the full amount of the overcharge—*i.e.* the total amount of royalties paid—as evidence of damages." *Id.* at 1376. *See also National Constructors Association* v. *National Electrical Contractors Association*, 498 F. Supp. 510, 550 (D. Md. 1980), *aff'd as modified*, 678 F.2d 492 (4th Cir. 1982).

The decision of the court of appeals affirming the *prima facie* ruling of the August 4 Order is thus hardly surprising in light of this Court's decisions in *Westinghouse* and *Bigelow* and the exercise of a lower court's issue-framing power in cases such as *Yoder*.

B. There Is No Conflict Between the Decision Below and Those of Other Circuits.

Petitioners ignore the established legal principles on which the decision below is based. Instead, in a transparent effort to concoct an issue worthy of this Court's attention, they first seek to shoehorn this case into the fact pattern of *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 102 S. Ct. 2232 (1982) ("*Plywood*"), and then strive to manufacture a conflict among the circuits by setting this case and *Plywood* against a single, thirty-five year old district court opinion and a collection of utterly irrelevant delivered pricing and tying cases.

The differences between this case and *Plywood*, however, totally overwhelm any passing similarities. In *Plywood*, for example, the court failed to give the jury *any* instruction on measuring the amount of damages; here, the case was tried by an experienced trial judge who had the benefit of exhaustive briefing by both sides on that question. In *Plywood*, a treble damage judgment was entered at the end of the *liability* stage of a bifurcated trial in which the amount of damages question had been reserved for subsequent trial; here, a full damages trial was held. In *Plywood*, defendants were asking this Court to vacate a treble damage judgment as to which they contended there was no evidentiary foundation; here, defendants have already succeeded in having a treble damage judgment vacated and remanded for the consideration of additional evidence. And the question presented to this Court in *Plywood* (*see* DMRC Pet. at I n.), was, in essence, answered by the court of appeals here in Petitioners' favor (J.A. 9-11, 690 F.2d at 385-86) since, when this case is tried on remand, the district court will be required to decide whether the initial purchase price of the machines would have been increased if the production royalty programs had not been preserved by the illegal combination.

Moreover, the false twist royalties at issue here are markedly different from "phantom freight" charged in *Plywood* and the

two other "phantom freight" cases cited by Petitioners (DMRC Pet. at 11)[10] raise damages questions fundamentally different from those raised here. In those phantom freight cases, the defendant sold and transported his product for a single, unitary price which covered two cost components: the producer's cost of producing the product *and* the cost of shipping it to the customer. Measuring damages in such cases requires separating (by the party who bears the burden of separation) that portion of the phantom freight which covers the actual shipping cost or estimating how the base price of the product will change to cover the shipping cost if the freight charge is eliminated completely. To the extent that those cases say anything about damage measurement, they say only that where a single price which covers two distinct cost components is the subject of an antitrust violation, both cost elements must be considered in assessing the damages caused by the antitrust violation.

Here, by contrast, the costs associated with producing and selling the machines themselves were not incurred by Petitioners. Those costs were incurred by separate parties and their costs were covered by a machine purchase price which was not challenged in the litigation or involved in the illegal combination. The illegal royalty payments made to DMRC and shared with Chavanoz did not in any way relate to the costs incurred by the machine sellers, but rather were payments exacted under a separate license. Thus, unlike the "phantom freight" cases, the royalties were paid to a party other than the machine manufacturer, so those payments could not be transferred from one cost component to the other.

Viewed another way, it is simply not accurate to suggest that *Plywood* and the other "phantom freight" cases involve "two-part prices" (*see* DMRC Pet. at 8) in the same sense as the

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10 Those two other "phantom freight" cases, *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D 43 (D. Utah 1973), *aff'd in part, vacated in part*, 503 F.2d 459 (10th Cir. 1974); and *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), in fact, did not involve damages issues at all.

present case. In those cases, the buyer received an invoice for one amount with no breakdown, as between the two distinct cost components or between the value received by the purchaser and the overcharge. Here, the "invoices" were sent to Respondents containing that very breakdown: one figure for the initial purchase price to Leesona or ARCT (the consideration for the machine) and another figure for the royalty payment to Leesona or DMRC (the overcharge, as shown by royalty reports). In other words, here there were two separately stated price components, the maintenance of only one of which was the subject of the combination and constituted the overcharge, at least *prima facie*. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968).

Futhermore, while the purpose of the combination in *Plywood*—and virtually all price fixing cases for that matter—was to get more for the product sold, the purpose of the combination here was far more specific and was established by findings made at the liability stage: it was to ensure that production royalties would be charged ("to preserve and enhance the interdependent royalty programs . . ." 444 F. Supp. at 682).

The tying cases cited by Petitioner (DMRC Pet. at 10-11; Milliken Pet. at 18, 20) present no conflict either. To the contrary, they demonstrate the propriety of the August 4 Order. In the typical tying case, the purchaser of the tied and tying goods receives two items of value. In *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), and *Kypta* v. *McDonald's Corp.*, 671 F.2d 1282 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982), the plaintiffs received the value of their respective franchise licenses (the "tying" product) as well as the value of the "tied" products which they purchased. Accordingly, the courts in those cases quite properly held that the value of both products should be considered in measuring damages. The August 4 Order gave Petitioners the identical opportunity to demonstrate that the royalties which they charged the throwsters—like the prices for the tied products—were supported by some "lawful considerations," and the court of appeals, of course,

took an even more expansive view as to the evidence that Petitioners could offer.[11]

Finally, there is no need for this Court to devote time and effort to resolve an alleged conflict between a court of appeals decision, based on exceptional facts and involving bifurcated trials whereby amount of damages was tried against a background of extensive causality findings made at the earlier liability trial, and *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), a single, rarely cited, thirty-five year old district court opinion in which the court ruled, on that case's own unique facts, that the plaintiff failed to prove fact of damage or causality at all.

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11 Other cases relied on by Petitioners (DMRC Pet. at 11; Milliken Pet. at 18 and 20), such as *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980); *Jacobi* v. *Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); and *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 1982-83 Trade Cases (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983), are irrelevant. *Catalano* and *Jacobi* did not contain holdings on the issue of damages at all. *MCI*, the one case in which a damages question was faced, is utterly inapposite. There, the court of appeals reversed and remanded an award of damages because the plaintiff included in its damage calculation losses from defendant's conduct which was found to be *lawful*. Here, by contrast, the *prima facie* rulings below simply reflect the finding made at the liability trial that Respondents were, in fact, damaged when they paid the very royalties, the maintenance and preservation of which were the purpose and effect of the illegal combination.

II.

NO QUESTION MERITING THIS COURT'S REVIEW IS PRESENTED BY THE RULING BELOW THAT PETITIONERS ARE PRECLUDED FROM ASSERTING AT THE DAMAGES TRIAL A CAUSALITY ARGUMENT WHICH THEY FAILED TO MAKE AND WHICH IS CONTRARY TO THE POSITION THEY ASSERTED AT THE INITIAL TRIAL AT WHICH THE ISSUES OF VIOLATION AND CAUSALITY WERE DETERMINED.

The district court's refusal to permit Petitioners to assert at the damages trial an unpleaded causality defense in the nature of *in pari delicto* raises no issue worthy of this Court's review. The courts below properly excluded that defense as untimely since causality was an issue litigated at the liability trial (J.A. 12-15, 690 F.2d at 387-88) and was resolved in the liability decision and subsequent affirmance on appeal.

Petitioners claim that Burlington should not be permitted to recover damages based on its royalty payments to Leesona because of the circumstances surrounding Burlington's settlement of an earlier litigation with Leesona. Burlington's allegedly wrongful conduct, the argument goes, caused its own injury. A detailed rebuttal of Petitioners' scenario is not appropriate here, but a few observations are warranted.

First, the district court's bifurcation order expressly left open only one issue for the subsequent damages trial—*i.e.*, the "amount of damages." That order (Pre-trial Order No. 76-1) was issued prior to the liability trial and stated: "All issues in the cases have been consolidated for trial except that the issue of the amount of damages, if any, shall be reserved for subsequent proceedings following determination of liability." (J.A. 111).[12] Accordingly, at the liability trial the district court

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12 The judgment entered by the district court upon conclusion of the liability trial reiterated that only the amount of damages remained to be litigated: "This court shall hereafter determine by separate trial the

proceeded to determine the issue of causality and found that Burlington was injured as a result of its royalty payments to DMRC and Leesona (*see* p. 9, *supra*).[13] Those findings were affirmed on appeal in the face of a major effort by Petitioners to obtain a reversal. The courts below properly concluded that the newly asserted defense was one which should have been raised at the liability trial, was not and was therefore lost.

Second, Petitioners had a full opportunity to present their contorted causality argument at the liability trial. Their failure to do so was not a mere oversight of a possible defensive argument, but represented a conscious trial strategy. Petitioners then affirmatively asserted the propriety of the same Burlington conduct which they now claim was improper and the real cause of Burlington's damages. For example, in their petition for certiorari seeking review of the liability issues, DMRC and Chavanoz told this Court: "We do not suggest an *in pari delicto* defense. Rather, we submit that what Burlington lawfully did, DMRC and Chavanoz were also free to do." (R.A. 5). Despite a full scale assault on causality at the liability phase of this litigation—from trial through appeal to their unsuccessful petitions for writs of certiorari—Petitioners never raised the causality argument which they now assert. Causality was found and affirmed and is now the law of the case. *See Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 21 n.9 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Petitioners were properly precluded from endeavoring to relitigate the question at the damages trial—particularly by asserting a position directly contrary to the position they had earlier advanced.[14]

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amount of damages which plaintiffs are entitled to recover." (R.A. 6). Since liability had been found, the "if any" language from the pretrial order was deleted.

13 Milliken's statement that "[t]here was *no* finding one way or the other regarding the Leesona royalties as showing fact of injury" (Milliken Pet. at 15) (emphasis in original) is simply false.

14 Defendants' last minute attempt to change their interpretation of Burlington's conduct in itself provided an ample basis for its rejection.

(footnote continued)

Third, Petitioners now contend—for the first time in this litigation—that they were precluded from offering evidence of Burlington's allegedly wrongful conduct at the damages trial as a "beneficial byproduct" under *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). But the so-called "offer of proof" which they filed did not include any attempt to measure the supposed "competitive advantage" or "beneficial byproduct."[15] This contention is thus entirely unsupported by the record, and affords no basis for challenging the decision below.

Fourth, the purported conflict among the circuits over the appropriateness of converting an *in pari delicto* defense into an attack on causality which can be mounted against the amount of damages determination is non-existent. Not a single case cited by Petitioners as evidence of this conflict (DMRC Pet. at 16; Milliken Pet. at 14-17) concerned a bifurcated trial or addressed the question whether the *in pari delicto* or causality defense could be raised for the first time in a separate trial on

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Such revisionism offends the integrity of the judicial process, and is precluded by the doctrine of judicial estoppel. That doctrine, which is predicated upon a desire to prevent litigants from playing "fast and loose" with courts according to the "vicissitudes of self-interest," forbids a party who has taken one position from later in the course of that proceeding adopting an inconsistent position. IB J. Moore, *Moore's Federal Practice* ¶ 0.405[8], at 767-68 (2d ed. 1982); *Coleco Industries, Inc.* v. *United States International Trade Commission*, 573 F.2d 1247, 1258 (C.C.P.A. 1978); *Scarano* v. *Central Railroad*, 203 F.2d 510, 513 (3d Cir. 1953); *Selected Risks Insurance Co.* v. *Kobelinski*, 421 F. Supp. 431, 434-35 (E.D. Pa. 1976). Indeed, the doctrine of judicial estoppel was expressly recognized in an earlier stage of this litigation. *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1177-83 (D. S.C. 1974).

15 In the courts below, the focus of Petitioners' argument was that their new-found causality defense, if recognized, would have barred Burlington from recovery of any damages or, at the very least, any damages based on royalty payments to Leesona. The court of appeals quite properly analyzed their argument as an untimely effort to raise the defense of *in pari delicto* (J.A. 12-15, 690 F.2d at 387-88).

the amount of damages, after causality had already been adjudicated and had become the law of the case through affirmance by the court of appeals.[16]

Fifth, neither *Knutson* v. *Daily Review, Inc.*, 664 F.2d 1120 (9th Cir. 1981), nor *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964), are relevant. Unlike the situation here, neither of those cases involved an attempt to relitigate at the damages trial issues previously resolved at an earlier trial and affirmed on appeal.

Finally, even if the courts below erred in excluding the proffered "evidence" of Burlington's own allegedly wrongful actions, the facts—when stripped of Petitioners' distortions—reveal nothing more than the efforts of a victim of an antitrust violation to mitigate its damages. Burlington, unlike defendants, was not a competitor of Leesona. Burlington was Leesona's customer and a victim of Leesona's illegal machine licensing program in which Leesona and its competitors shared royalties which were exacted from Burlington and other throwsters. The conduct of Burlington which Petitioners now question involved nothing more than an agreement between

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16 *See Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976) (motion to strike defense of *in pari delicto* granted); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (judgment for antitrust plaintiff reversed for failure to prove *fact* of damage); *Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977) (summary judgment for defendant on grounds of *in pari delicto* reversed); *Bernstein* v. *Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975) (dismissal of case on grounds that NLRB had exclusive jurisdiction reversed; *Perma Life* discussed only by way of analogy). Although the Handler & Saks article cited by DMRC and Chavanoz (DMRC Pet. at 16) does discuss the proper scope to be accorded the *in pari delicto* defense in antitrust cases, the article actually refutes Petitioners' contention. The authors argue, *inter alia*, that *in pari delicto* should be utilized *as a defense to liability* as it was at common law. Handler & Saks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 20 Geo. L.J. 1123, 1152-55 (1982).

Burlington and Mechanical Specialty, a company which had sold Burlington a number of spindles for false twist machines, in which Mechanical Specialty agreed to refund to Burlington that portion of royalties paid by Burlington to Leesona which Leesona had agreed to kickback to Mechanical Specialty, one of its competitors, pursuant to a combination among Leesona and other manufacturers which was ruled *per se* illegal by the Court of Appeals for the Fifth Circuit.[17] Burlington, therefore, did nothing more than mitigate a portion of the damages which it sustained by reason of royalty payments to Leesona.[18]

Despite Petitioners' suggestion to the contrary (DMRC Pet. at 14 n.), Burlington never sought to recover treble damages for the royalties which were refunded to it by Mechanical Specialty and damages for those refunds were never awarded. Indeed, Burlington stipulated before the damages trial that the refunded amounts were not to be included in its damage computations.[19]

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17 The antitrust violation in question was adjudicated in *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), a case involving, *inter alia*, antitrust claims brought against Leesona by Burlington and many other throwsters. It involved a scheme in which Leesona shared with other competing manufacturers of false twist machinery, pursuant to agreements whereby such manufacturers undertook to sell only to persons licensed by Leesona, one-third of the royalties which Leesona received from throwsters by reason of those throwsters' use of machines manufactured by the licensed Leesona competitor. The court found that that arrangement constituted a form of horizontal price fixing which operated to the detriment of throwsters such as Burlington.

18 Furthermore, as a simple matter of causality, all that the proffered evidence showed was that in 1963 Burlington took a Leesona license, for whatever reason, on its Mechanical Specialty spindles (it had already signed several such licenses to obtain machines directly from Leesona). Thereafter, it paid royalties and those royalties, like all others, would have been destroyed had the 1964 combination between defendants and Leesona not taken place.

19 The refunds received by Burlington from Mechanical Specialty were also insignificant in the context of the total royalties paid to Leesona by Burlington because the overwhelming majority of machines used by

Petitioners' effort to mischaracterize Burlington's simple effort to minimize its antitrust injury as some sort of culpable act reflects their desperation as this fourteen year old litigation draws to an end and the certainty of a substantial treble damage judgment looms on the horizon.[20] Petitioners' distorted and belated effort to reverse position and relitigate an already adjudicated issue raises no issue worthy of review by this Court.

III.

THE QUESTION OF CLAIM REDUCTION IS INEXTRICABLY LINKED TO CONTRIBUTION AND PRESENTS NO QUESTION FOR REVIEW BY WRIT OF CERTIORARI IN LIGHT OF THIS COURT'S DECISION IN *TEXAS INDUSTRIES.*

Petitioners' effort to circumvent this Court's recent ruling in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), that there is no right to contribution among antitrust defendants and thereby salvage their defense of "claim reduc-

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Burlington were not supplied to it by Mechanical Specialty but were supplied directly by Leesona on which Burlington paid, without refund, the same royalties as all other Leesona licensees. Thus, the record below showed that rebates received from Mechanical Specialty only amounted to six and eleven percent of Madison's and Burlington's respective Leesona royalty payments during the relevant period. This is hardly the "hidden one-third kickback on its royalty payments to Leesona" claimed by Petitioners (DMRC Pet. at 14).

20 In any event, the anticompetitive conduct which Petitioners seek to attribute to Burlington is conduct allegedly designed to gain it an anticompetitive edge over its throwster competitors. Even if true, that would be a fundamentally different conspiracy than the one found here—a horizontal conspiracy designed to injure defendants' customers or licensees. As the court of appeals recognized (J.A. 14, 690 F.2d at 398), the law is absolutely clear that Petitioners would not be immunized against liability to their victim by reason of that victim's alleged involvement in anticompetitive conduct of its own. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

tion" can be dealt with summarily. The decision of the Fourth Circuit rejecting that defense (J.A. 22-31, 690 F.2d at 391-95) was based on ample precedent which is confirmed by Petitioners' failure to make even a token effort to assert that the decision is in conflict with that of a single other circuit. Petitioners can make no such argument because, in the absence of a right to contribution, there is no defense of claim reduction.

Claim reduction is simply a corollary to contribution which is used to allocate liability among defendants when there have been partial settlements. Indeed, that position was eloquently advanced to this very Court by these same Petitioners—in the role of *amici curiae*—one year before *Texas Industries* was decided[21] and counsel maintained that position in the district court immediately after the *Texas Industries* decision was announced (*see* J.A. 71-72). We are aware of no case—and Petitioners cite none—in which a claim reduction defense was

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21 In their *amici curiae* brief in *Westvaco Corp.* v. *Adams Extract Co.*, 606 F.2d 319 (5th Cir.), *cert. dismissed*, 449 U.S. 915 (1980), a case in which the issue before the Court was the right to contribution in antitrust cases, Petitioners asserted:

> If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.
>
> . . . Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendents.
>
> Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled.

(R.A. 7).

sustained absent a pre-existing right of contribution. The court of appeals fully recognized that basic proposition and properly reversed the district court's claim reduction ruling in light of *Texas Industries*.

In an effort to avoid the fatal effect which *Texas Industries* has on their defense, Petitioners now ask this Court to take the revolutionary step of re-examining the entire rule of joint and several liability in antitrust cases, with the effect that it could be manipulated on a case-by-case basis, on the ground that its application here is somehow unfair. This Court succinctly dismissed that argument in *Texas Industries* as inappropriate for judicial consideration:

> The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) [citations omitted]:
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> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."
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> *Accord, United States* v. *Topco Associates*, 405 U.S. 596, 611-12 (1972) [citations omitted].

Id. at 646-47. There is no reason for this Court to reverse or abandon its ruling in *Texas Industries* and assume responsibility for deciding a question of "fairness" which is better left for Congress.[22]

Even if this Court considered it proper to address the fairness question, considerations of fairness do not require a result different from that reached below. The 1974 settlement of an industry-wide, patent-antitrust litigation between Burlington and Leesona was not a "sweetheart" deal between two co-conspirators, as suggested by Petitioners, designed to prevent exposure of Burlington's allegedly wrongful conduct (DMRC Pet. at 14 n., 19). Rather, the record below demonstrates that that settlement was part of a global settlement in which Burlington settled on the same basis as more than twenty other throwsters. Indeed, in commenting on his claim reduction ruling, the district judge made it plain that defendants' allegations concerning a "sweetheart" deal were "the farthest [thing] from my mind" (R.A. 8). Moreover, Petitioners' protestation concerning the "unfairness" of the size of Leesona's settlement payments to Burlington is completely exposed as hollow by the record below which reveals that Petitioners flatly refused to consider settling on a basis similar to the basis on which Leesona and Respondents settled in 1974 (R.A. 9).

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22 Indeed, this question has received intensive consideration in both houses of Congress. In the 97th Congress, no fewer than four bills were introduced which addressed the contribution—claim reduction question. Those bills—H.R. 1242, H.R. 4072, H.R. 5974 and S. 995—were the subject of extensive hearings, intense lobbying and long Congressional consideration. *See* Antitrust Equal Enforcement: Hearings on H.R. 1242, H.R. 4072, H.R. 5974 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981-82); Antitrust Equal Enforcement Act: Hearings on S. 995 Before the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981-82); S. Rep. No. 97-359, 97th Cong., 2d Sess. (1982). The issue will, apparently, be considered again in the 98th Congress. In the House, Chairman Rodino of the House Judiciary Committee has introduced H.R. 2244 which addresses the contribution question. Similarly, in the Senate, S. 380 was recently introduced by Senators Hatch, Thurmond, Laxalt and DeConcini.

Moreover, when Respondents settled with Leesona they did so in reliance on then unquestioned law:

> (a) The releases from Respondents to Leesona contained language which was specifically drafted pursuant to *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 342-48 (1971), to reserve their rights to proceed against defendants here for the balance of their treble damage claims; and
>
> (b) The settlement was entered into at a time when the universally applied method for dealing with partial settlements in antitrust treble damage actions was to measure the damages suffered by the plaintiff as a result of the entire conspiracy (*i.e.*, the acts of all the defendants, both settling and nonsettling), treble the damages and subtract the dollar amount of settlement payments from the resulting treble damage figure. *E.g.*, *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). As the court of appeals below recognized, that remains the law to this day.

To change the rule concerning the treatment of partial settlements to favor the wrongdoer at the expense of the victim and apply it in a case where the settlement occurred nine years ago would be grossly unfair.

Any lingering doubt about the "fairness" of the decision below is put to rest by Petitioners' conduct. Petitioners' raw violation of the Sherman Act and callous disregard for the nation's antitrust laws fairly leap from the record in this case. Petitioners' attitude toward the antitrust laws is perhaps best reflected in the words of Norman Armitage, the DMRC official who was the principal architect of the illegal conspiracy. Armitage wrote:

> [I]t is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly.

444 F. Supp. at 705 n.45. This "cavalier attitude toward the antitrust laws" (R.A. 10) and the conduct which it spawned does not merit a reexamination of the doctrine of joint and several liability in the interests of "fairness" to the wrongdoer. Certiorari should be denied on the claim reduction question.

IV.

THE QUESTION RELATING TO THE ADEQUACY OF MADISON'S PLEADING OF ITS DAMAGES CLAIM RAISES NO ISSUE WORTHY OF REVIEW, LET ALONE A CONSTITUTIONAL DUE PROCESS ISSUE.

The final question raised by Petitioners DMRC and Chavanoz also presents no issue that requires review by this Court. Petitioners simply seek to escalate a factual issue arising from a mundane application of the pleading requirements of the Federal Rules of Civil Procedure and from their own waiver of discovery into a question of constitutional dimension.

Unlike the situations in the decisions cited in DMRC's Petition, Petitioners had full notice, by means of an April 1971 pleading conforming to the Federal Rules of Civil Procedure,[23] that Madison, a corporation formed by the merger of Madison and its former subsidiary Fedelon Throwing Company on October 3, 1970, asserted an antitrust claim against them, and that pleading incorporated, by operation of state law,[24] the

23 Rule 8 of the Federal Rules of Civil Procedure provides, *inter alia*, that a pleading shall contain "a short and plain statement of the claim."

24 The applicable corporation law of North Carolina, N.C. Gen. Stat. § 55-110(b) (1982) (*see* Statutory Appendix), provided that the October 1970 merger automatically transferred and vested all of the rights and privileges of Fedelon, including choses in action, in the surviving corporation, Madison, without the need for any "further act or deed." Thus, Madison indisputably obtained the right to sue in its own name only, as Petitioners implicitly conceded in the courts below (*see* J.A. 18).

identical claims previously held separately by Madison and Fedelon. Also, unlike the situations in those decisions, Petitioners, acting upon the notice thus afforded them, appeared and vigorously contested that antitrust claim. In so doing, however, they chose not to extend their intensive discovery efforts into the specifics of Madison's alleged damages until years later when the damages trial was imminent.

The requirements of due process—actual notice of the pendency of the action and an opportunity to be heard—were fully met. *Cf. Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965); *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). Those requirements, however fundamental, have never been construed to impose an obligation that a plaintiff set forth in a pleading every evidentiary detail of his injury or damages claim. Indeed, under the Federal Rules of Civil Procedure, the function of particularization is allocated to the discovery rules. Those rules provided Petitioners the opportunity to seek and obtain additional information and, as a correlative, imposed on them an obligation to employ those procedures if they wanted to obtain particulars of Madison's claim. *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957); *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). But Petitioners chose not to avail themselves of their discovery opportunities—knowingly, consciously and as part of their litigation strategy—and must be deemed to have waived any right to later complain of surprise when the focus of the litigation shifted to the amount of damages issue.[25] The court of appeals correctly held that Petitioners, on those facts, had suffered no prejudice and could not justifiably "cry foul." (J.A. 20, 690 F.2d at 390). The pleading of Madison's damages claim simply raises no question appropriate for review by this Court.

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25 After liability was finally determined (and more than eight years after the amended pleading by post-merger "Madison"), Petitioners *first* sought discovery into the injuries claimed by Madison and the other plaintiffs. At that time they obtained documents relating to Fedelon's operations, corporate structure and merger, took depositions, independently corroborated Fedelon's royalty payments and eventually *stipulated* to the amount of those royalties.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petitions in No. 82-1410 and No. 82-1421 should be denied.

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Respectfully submitted,

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[Adopted Finding 15.41]

15.41 From the onset of settlement negotiations—from the concept of "joining hands" (Finding 15.27, *supra*) through the proposals for royalty sharing in 1961 (Finding 15.29-15.30, *supra*), the May 1963 "agreement in principle" (Finding 15.32, *supra*), and as demonstrated by the Ward Smith Algonquin Club proposal to admit validity of the known-to-be-invalid Leesona patents (Finding 15.38, *supra*)—the underlying tenet of the settlement discussions between defendants and Leesona was one which Robert Leeson expressed succinctly in August 1963: "Everything to settle so that all competitors [charge] a royalty."

Annotations:

PX 353-5258—(identified by Leeson at Vol. 19—p. 3861)

[Adopted Finding 15.67]

15.67 The expressed objectives of the parties in settling were in accord with the "theme song" of the negotiations: to maintain the interdependent royalty programs:

(a) According to Leeson, Leesona's objective in reaching an accord with Whitin, DMRC and Chavanoz was to ensure that all of its competitors in the sale and licensing of false twist machines would charge a production royalty;

(b) Norman Armitage has admitted that a main factor in settling, even though the Chavanoz patents were not in issue, was DMRC's desire to "preserve and enhance" its royalty income; and

(c) As for Whitin, the "if you win, you lose" concept was regularly discussed, whether or not in those exact terms, and its realization that royalty-free machines would have a serious effect on ARCT sales was a dominant factor in settling. Bob Waters, in fact, aptly summarized the purpose of the settlement in a statement to one of the throwsters:

> "They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leesona] patents out but in this case there would have been no royalty collected by Leesona which would have made it all the harder for ARCT to collect *any* royalty."

Significantly, in several days of testimony Waters made no attempt to disavow or explain away this pre-litigation explanation of the underlying reason for the settlement.

***Annotations*:**

(a) *PX 353-5258*—Leeson's notes: "everything to settle. . . ."

(b) Vol. 21—p. 4371 (Armitage)—"preserve and enhance" royalty income.

Vol. 20—p. 4151-52 (Armitage)] similar testimony *re* preserva-
] tion of royalty structure be-
Vol. 78—p. 15188, 15190 (Armitage)] ing a reason for settling.

(c) Vol. 80—pp. 15544-45 (Waters)—regularly discussed at Whitin.

Vol. 14—pp. 2929-30 (Waters)—serious effect on ARCT sales if Leesona royalty-free; factor in settling.

PX 586-1687—Strub (Duplan) to Roberts memo 3/69: statement of Waters quoted in text.

[Adopted Finding 15.49]

15.49 The importance which the interdependency of royalty programs played in the thinking of the defendants is underscored by the reaction of Armitage, Waters, Soep and Crouzet to the commencement of litigation challenging the validity of the Leesona patents in 1969. The threat of possible royalty-free machines if the Leesona patents were invalidated led Armitage to write to Roger Milliken: ". . . it would be very difficult to sell the machines on a royalty basis if machines for a very similar purpose were being sold by Leesona royalty-free."* Waters, Crouzet and Soep all made similar observations in recognition of the possible adverse consequences of the suit against Leesona. Their concern was summed up by Waters:

> "Most every one feels quite convinced that the Leesona license and royaly system will fail and this does mean as you mentioned in your letter 'the whole system of licenses in the United States is doomed to failure.' "

Since ARCT's position in the market in 1969-1970 was at least as strong as, if not stronger than, its market position in 1963-1964, the foregoing observations expressed in 1969-1970 are clearly relevant to show interdependency as of 1963-1964.

Annotations:

PX 459-682—Armitage to Milliken 11/69.

Vol. 80—p. 15673 (Waters)—very much concerned in 1969 that ARCT would be only licensed machine in U.S.

Vol. 18—p. 3727 (Waters)—sales would have been "far more difficult" if competitors selling royalty free.

Vol. 39—p. 7824-25 (Crouzet)

PX 460-837

* Armitage made this observation after meeting with Petry, Conrad and Soep in October 1969 to discuss the impact of the suit against Leesona on the DMRC licensing program.

PX 461-5263

DX 789

DX 815—concern of Crouzet and Waters.

PX 1201

PX 1202

PX 1203

Vol. 76—pp. 14873-74—October 1969 meeting—Conrad, Soep, Petry and Armitage.

PX 462-5264—Waters to Crouzet 7/70: quoted in text.

PX 535-742—Soep to Armitage 12/69: quoted in text.

Vol. 82—pp. 15972-74 (Waters)—market for ARCT machines in 1963-1964 not stronger than in 1969-1970.

[Adopted Finding 15.82]

15.82 The agreements and understandings reached by the defendants and Leesona in connection with the settlement of the Whitin litigation had the following effects on United States trade and commerce in the sale and licensing of false twist texturing machines:

(a) All false twist machines continued to be sold subject to a license agreement providing for the payment of production royalties at rates which tended to remain stable. It was well recognized in the industry that all machines were sold only under either a Leesona or a DMRC license. It was not until 1969, after the commencement of this litigation and the commencement of similar litigation against Leesona, when several of Leesona's manufacturing licensees and then ARCT, Inc. began selling to non-licensees, that the "whole system of licenses in the United States"—which was the objective and effect of the 1964 agreement—began to breakdown;"

(b) Defendants and Leesona maintained their monopoly position in the sale and licensing of false twist machines in the United States; and

(c) At the time this litigation commenced, all high speed false twist machines in use in the United States were operated under a license from either Leesona or DMRC that provided for the payment of a production royalty on each pound of yarn processed on the machines. Thus, after 1964, each of the plaintiffs paid production royalties to DMRC and those plaintiffs that operated Leesona machines or machines of Leesona's manufacturer's licensees also paid production royalties to Leesona.

***Annotations*:**

PX 462-5264—Waters to Crouzet 7/70: *re* "whole system of licenses in the United States".

Vol. 48—p. 9577—Topkis stipulation that all plaintiffs have paid royalties to DMRC.

e.g., Vol. 14—p. 2841 (Foil)

Vol. 15—pp. 3112-13 (Hamilton)

Vol. 27—pp. 5586-87; 5590 (Roberts)

Vol. 45—p. 9010 (Reed)—payment of royalties to Leesona.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

DEERING MILLIKEN RESEARCH CORPORATION and
MOULINAGE ET RETORDERIE DE CHAVANOZ,

Petitioners,

—v.—

DUPLAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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[Material Omitted]

[p. 15]

Ironically, one of the principal throwster-plaintiffs here is Burlington Industries, Inc., the largest textile company in the world. Burlington now complains that petitioners settled with Leesona. Yet in 1963 Burlington and its subsidiary, Madison, both settled identical litigation with Leesona: they took licenses from Leesona, they paid damages of $265,500 for past infringements, and they even consented to the entry of judgments adjudicating the Leesona patents valid (a step which Chavanoz and DMRC did *not* take). (A359-60.) Burlington must surely have realized—as did Chavanoz and DMRC—that the consequence of settlement would be "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed." (444 F. Supp. at 682, A59.) Why, then, may Burlington sue Chavanoz and DMRC for following Burlington's lead? We do not suggest an *in pari delicto* defense. Rather, we submit that what Burlington lawfully did, DMRC and Chavanoz were also free to do.

[Material Omitted]

[pp. 22-24]

II.

Does the Fact that Plaintiffs Paid Royalties to DMRC after the Leesona Settlement Establish the Fact of Injury Required by Section 4?

The courts below ruled that plaintiffs need not prove that they have suffered actual injury as the result of the settlement of patent litigation. It is enough, the courts held, if plaintiffs show that they *might* have saved money *if* there had been no settlement.

This appears clearly from the only language which the trial court devoted to the "fact" of injury (444 F. Supp. at 687, A72):

"The sizable royalty income collected by DMRC in the years following the settlement affords graphic proof of the impact which the [licensing] program had upon [plaintiffs'] businesses [fn. on annual royalty income received by DMRC, ranging from $1,000 in 1959 to $123,302 in 1964 to $3,329,303 in 1969 to $982,640 in 1972]. The court concludes that as a direct consequence of the violations of Sections 1 and 2 of the Sherman Act by DMRC and Chavanoz the plaintiffs have been injured in their business and property within the purview of 15 U.S.C. § 15."

Thus the court holds that "injury" is proven by the fact that the throwsters continued to pay royalties to DMRC after the 1964 Leesona settlement. To reach this conclusion, the trial court necessarily but silently rested on a chain of assumptions which were not and never could have been proven, among them:

(1) That if the settlement had not taken place, the Chavanoz side would have pressed the litigation through trial, appeal, certiorari petition, etc., winning on all three Leesona patents in suit at all times;

(2) That invalidation of the three Leesona patents in suit would have resulted in Leesona's abandoning its royalty program, even though Leesona had other patents which could have (and did) support a royalty program;

(3) That the elimination of a Leesona royalty program would have necessitated reduction or elimination of the Chavanoz/DMRC royalty program—despite the fact that, as the trial court said, patented ARCT machines were "in great demand in the industry" (444 F. Supp. at 750, A216), and even though Chavanoz continued to introduce and patent new features after the settlement.

There is no way, we submit, for mortal man to do anything but guess as to whether any of these assumed "facts" would have

occurred, to what degree, and when, had the settlement not taken place. In any event, there is no *proof* whatsoever in this record. The courts below referred to none. And it is proof of real injury which Section 4 requires.

[Caption Omitted]

Amended Judgment Order

These cases having been duly consolidated for trial and having come on for trial on the liability issues only (including, as to the antitrust claims, violation of law and fact of damage) before the undersigned United States District Judge, all parties having waived trial by jury, and witnesses for all parties having been heard, documentary and physical exhibits having been received in evidence, and the Court having heard arguments on the facts and the law and having made its findings of fact and conclusions of law in the Memorandum of Decision filed July 29, 1977, now, therefore, pursuant to the Memorandum of Decision filed July 29, 1977, it is

ORDERED, ADJUDGED AND DECREED:

[Material Omitted]

10(a). Defendants Chavanoz, DMRC and DMI have by the Leesona settlement of March 31, 1964, and their activities subsequent thereto conspired with Leesona to violate Sections 1 and 2 of the Sherman Act with resulting damage to the business and property of the plaintiffs (15 U.S.C. § 1 and 2).

(b). Plaintiffs shall have and are hereby granted judgment pursuant to the foregoing findings of liability. This court shall hereafter determine by separate trial the amount of damages which plaintiffs are entitled to recover.

[Material Omitted]

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge
Eastern District of North Carolina
(Sitting by Designation)

Dated: October 31, 1977

JUDGMENT ENTERED ON THE DOCKET
This 2nd day of November, 1977.

MILLER C. FOSTER, JR., *Clerk*
by: /s/ Edith W. Thomas
Deputy Clerk

No. 79-792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, and GEORGIA-PACIFIC CORPORATION,

Petitioners,

—v.—

ADAMS EXTRACT COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

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[Material Omitted]

[p. 4]

I.

CLAIM REDUCTION AFFORDS AN EQUITABLE APPORTIONMENT OF DAMAGES IN CASES INVOLVING PARTIAL SETTLEMENTS.

If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.

[p. 5]

We are sure that the parties' briefs will discuss at length the conflict in the Courts of Appeals on the broad issue of damage apportionment and the desirability in general of a rule permitting contribution in antitrust cases. Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendants.

Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled. By acceptance of a partial settlement, in other words, the plaintiff is regarded as having sold his claim for any damages attributable to the party with whom he settles.

TRANSCRIPT OF HEARING AT ELIZABETH CITY, NORTH CAROLINA, ON MARCH 3, 1982

[Caption and Appearances can be found in the Joint Appendix at 90-91]

[Material Omitted]

[pp. 5-6]

MR. FOSTER: Yes, Your Honor, you have precisely identified one of the two possible what we consider misunderstandings that could arise.

A second possible misinterpretation of the term "particular circumstances" or whatever that term was in Your Honor's initial Order, might be a contention that Your Honor perceived the Lesona (phonetic) settlement involving Burlington and the throwsters as some sort of a sweetheart deal.

The words that are used when this subject is discussed in the Congress by our friends from the other side are "blackmail" and "extortion." We haven't heard those words in the Courtroom in this case, and I don't believe that there should be any misunderstanding about that either. That's the concern I had.

THE COURT: Well, let me say that the latter of those things is the farthest from my mind, and that with respect to the other things, the adopting of some language, you know, I can't carry all of this—probably I ought to, but exactly what I said and why I said it some five or six years ago in this thirteen year old litigation.

It was farthest from my mind that we would ever open up anything other than the question of the viability and applicability of the defense of claim reduction.

And so, whatever is necessary to explicate that on the record so that the issue will be clearly defined for the Fourth Circuit to say here and now whether or not claim reduction applies in this case, or in any case ever.

[Caption and Appearances Omitted]

March 26, 1976

10:00 O'Clock A.M.

PRE-HEARING CONFERENCE

JUDGE FRANKLIN T. DUPREE, JR., Presiding

[Material Omitted]

THE COURT: How come this case isn't settled?

MR. RIFKIND: I can answer it briefly. I can say that we—

THE COURT: It is all their fault?

MR. RIFKIND: No, we want them to pay us a lot of money for the royalties they owe us and they say they don't owe us any royalty and we owe them a lot of damages by way of antitrust. We have never been able to cross that bridge in both directions.

THE COURT: I interpret that to be the situation that obtains in most settlement—

MR. RIFKIND: That is true.

THE COURT: —cases. That is, the posture of most settlements is that they are too far apart in dollars and that is what lawsuits are usually about.

Does anyone feel that further conversations looking to amicable disposition might be fruitful?

MR. SMITH: Your Honor, I think it depends on the posture and principle with which the other side approaches the matter. I mentioned earlier that some litigation had been terminated and on a basis very satisfactory to the throwsters. That proves that we are not impossible to deal with.

If these gentlemen want to approach the matter in the way that their counterparts approached it, there could be some

fruitful result, but that is a commitment that we have never had from the other side.

MR. WEST: Your Honor, mention has been made already of the litigation that most of our clients had with Leesona, which involved pretty much the same issues. They wanted royalties from us and we wanted royalties back that we had already paid. That litigation was finally resolved last year. Leesona makes no further claim that either their patents or license agreements are enforcible [sic] and they did repay us some of the margin.

MR. RIFKIND: We are not prepared to operate in that kind of territory at all.

[Adopted Finding 15.59]

15.59 Although desiring to avoid the appearance of an antitrust violation, Armitage's cavalier attitude toward the antitrust laws is revealed in a letter to Soep dated August 19, 1963:

> ". . . it is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly."

Annotations:

PX 435-633A

§ 55-110. Effect of merger or consolidation.

(a) When such merger or consolidation has been effected:

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.

(b) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subsection are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

. . .